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SUZILAWATI ALI & ANOR v. DR ALIF AL AIN MOHD FATHILAH, PEGAWAI PERUBATAN HOSPITAL CHANGKAT MELINTANG & ORS

HIGH COURT MALAYA, IPOH
ABDUL WAHAB MOHAMED J
B [CIVIL APPEAL NO: AA-21NCVC-3-02-2020]
15 NOVEMBER 2022

Abstract – *It is generally the position for public hospitals that its doctors or nursing staffs are the direct employees of the public hospital and the Government of Malaysia is liable for the negligence of its servants and agents. A doctor is under a duty to take reasonable care to ensure that the patient is properly diagnosed and advised and is informed of any material risks involved in any recommended treatment. Public hospitals and the Government owe a non-delegable duty of care to ensure that their doctors/consultants are equipped with the necessary qualification, skills and competence to carry out tasks in treating patients.*

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E ***TORT:*** *Negligence – Medical negligence – Claim for damages by parents of deceased – Breach of contractual duty to use reasonable skill and care – Diagnosis, management, care, treatment and advise provided – Whether public hospitals and/or servants/agents of Government of Malaysia caused deceased's death – Whether public hospitals and Government of Malaysia vicariously liable – Whether parents contributed to deceased's death*

F ***TORT:*** *Duty of care – Non-delegable duty of care – Claim for damages by parents of deceased – Breach of contractual duty to use reasonable skill and care – Diagnosis, management, care, treatment and advise provided – Non-delegable duty of public hospitals and Government of Malaysia to ensure that doctors/consultants equipped with necessary qualification, skills and competence to carry out tasks in treating patient*

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The plaintiffs were the parents of a five-year old minor ('deceased') who had a history of breathing difficulties and was receiving treatments at Pusat Perubatan Universiti Malaya, Kuala Lumpur ('PPUM'). However, while on a holiday in Perak, the deceased was taken to the Emergency Department of
H Hospital Changkat Melintang, Perak ('second defendant') following a fever that persisted for two days, seven episodes of vomitting and difficulty in breathing. The deceased was attended by a medical officer ('first defendant') who was in the employment of the Government of Malaysia ('16th defendant') and attached to the second defendant. The first defendant
I (i) diagnosed the deceased as having pneumonia, sepsis and acute gastro enteritis; (ii) informed the plaintiffs that the second defendant did not have the oxygen ventilator machine as provided for the deceased at PPUM nor the paediatric specialist facilities to cater for the needs of the deceased who had

a history of no active resuscitation ('NAR') issued by PPUM; (iv) gave a choice of whether to send the deceased to Hospital Seri Manjung ('15th defendant') or to Hospital Raja Permaisuri Bainun, Ipoh, failing which the deceased would collapse. However, the first defendant did not clearly inform the plaintiffs of the facilities available at both hospitals; (v) advised against taking the deceased to PPUM, as requested by the plaintiffs, as the deceased's oxygen level was failing and, as such, the plaintiffs opted for the 15th defendant; and (vi) issued a death-in-line order and referred the deceased to the 15th defendant. The deceased arrived at the 15th defendant but was only warded a little over an hour although the medical officer at the 15th defendant ('fourth defendant') had specifically ordered for admission before the deceased left the second defendant. The deceased was only seen by the fourth defendant 1 hour 15 minutes after he was warded. Despite the seriousness of the deceased's condition, the deceased was only attended by the Paediatric Specialist of the 15th defendant ('11th defendant') on the third day of admission. The deceased's condition was more stable upon receiving the support of a high flow oxygen mask and had maintained the same for a day. However, the deceased's condition started to deteriorate upon which the plaintiffs again requested for the deceased to be transferred to PPUM to which the 15th defendant rejected on the ground that the deceased was in an unstable condition to be transferred to another hospital at the material time. The plaintiffs nevertheless proceeded to hire a private ambulance and had the deceased transferred to PPUM. Unfortunately, the deceased did not survive the journey and met his demise before arriving at PPUM. Hence, the present claim by the plaintiffs against the defendants for special, general and aggravated damages in the amounts of RM26,064, RM350,000 and RM500,000, respectively. In support of their claim, the plaintiffs submitted that the death of the deceased was caused by the negligence of the defendants, their servants and/or agents and each and every one of them and/or by the breach of contractual duty, failed to use reasonable skill and care, in diagnosis, management, care, treatment and advise as provided by the second and 15th defendants and/or by the servants/agents of the 16th defendant, respectively.

Held (ordering accordingly):

(1) The first defendant had, in exercising his duty as a medical officer, carried out sufficient examinations, made necessary calls to PPUM and the 15th defendant in respect of the deceased's case and had stabilised the deceased's condition before arranging for the deceased's transfer to the 15th defendant. There was no failure on the first defendant to advise the plaintiffs of the seriousness of the deceased's condition. The urgency of the situation was, in fact, recorded in the medical report where the first defendant had informed the plaintiffs to make their choice between the two hospitals, failing which, the deceased was going to collapse.

A Furthermore, the deceased's clinical condition improved significantly after the management at the second defendant and the medical management rendered to the deceased at the second defendant was appropriate and had met the minimum standard of care. (paras 32-34)

(2) There was a total lack of evidence concerning the insufficiency of advice given as well as the examination carried out by the first defendant in exercising his duty as a medical officer. The first defendant had not breached his duty of care in providing advice to the plaintiffs. The evidence showed that the first defendant had taken into account the seriousness of the deceased's health condition, the urgency of the situation, the plaintiffs' request for NAR and the logistical distance in rendering advice to the plaintiffs. (paras 36 & 37)

(3) Most of the reviews and management plans of the deceased were made at the level of medical officers only. When asked for the future plan on treatment for the deceased, the 11th defendant stated that the plan he had for the deceased was to provide high flow oxygen mask although he admitted that the said treatment was not working. The findings of the internal inquiry showed that there was a lack of early focused discussion on the treatment options offered in the 15th defendant. It was also found that the non-invasive mode of ventilation was not readily available in the Department of Paediatrics at the 15th defendant. The unavailability of the CPAP/BiPAP machine at the 15th defendant resulted in sub-optimal patient care. Despite the lack of future plan on treatment for the deceased as well as the unavailability of the CPAP/BiPAP machine in HSM, the defendants failed to transfer the deceased to PPUM for CPAP/BiPAP although the deceased was in a stable condition to be transferred for a day. Therefore, the defendants had breached their duty of care to ensure the best treatments provided to the deceased. The defendants also failed to make the necessary attempt to transfer the deceased to a higher level of care institution that was appropriate to the medical needs of the deceased. (paras 40-44)

(4) In view of the defendants' negligence conduct, the 15th and 16th defendants were vicariously liable for the negligence of their employees. The 15th and 16th defendants also owed a non-delegable duty to the plaintiffs to ensure that the doctors/consultants had the necessary qualification, skills and competence to carry out their tasks in treating the deceased. (paras 51 & 52)

(5) The plaintiffs were well aware of the risk that they were taking when they had the deceased transferred to PPUM. The defendants had explained to the plaintiffs the deceased's condition and the need to stabilise the deceased before the transfer; the plaintiffs were informed that the deceased was not fit for transfer. However, the defendants'

advice went unheeded. The plaintiffs' action in transferring the deceased to PPUM in an unstable condition was unreasonable. The plaintiffs' rash action ultimately caused the untimely death of the deceased. Therefore, the plaintiffs had contributed largely to the death of the deceased. A finding of contributory negligence would result in the apportionment of liability to the plaintiff. In the premises, the liability was apportioned at 40% to the third to 16th defendants and 60% to the plaintiffs. (paras 54-57)

(6) The plaintiffs were awarded: (i) RM26,064 in special damages; (ii) RM150,000 for pain and suffering and loss of amenities. The deceased was not promptly acted upon, causing the condition of the deceased to deteriorate. Throughout the four days at the 15th defendant, the deceased underwent extreme pain, suffering, severe mental agony, distress and severe mental strain until his untimely death. This was an instance in which a substantial award for pain and suffering and loss of amenities was appropriate; and (iii) RM100,000 in aggravated damages. The suppression of the deceased's medical records had caused the plaintiffs to incur avoidable costs and expenses and time in filing the pre-action discovery. Despite the overwhelming evidence of negligence on the part of the defendants, the defendants refused to admit liability but instead filed a defence denying liability. Such conduct by the defendants would have caused unnecessary distress to the plaintiffs. (paras 65-67)

Case(s) referred to:

ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd [2001] 8 CLJ 1 HC ***(refd)***

Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***

Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC ***(foll)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Hamizan Abd Hamid v. Wong Kok Keong & Anor [1994] 4 CLJ 122 ***(refd)***

Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***

Jub'li Mohamed Taib Taral & Ors v. Sunway Lagoon Sdn Bhd [2001] 4 CLJ 599 HC

Lim Poh Choo v. Camden Health Authority [1980] AC 174 ***(refd)***

Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor [1995] 3 CLJ 70 HC ***(refd)***

Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***

Pyu Pyu Ma v. Dr Lim Soo How & Ors [2019] 1 LNS 829 HC ***(refd)***

Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor [2006] 5 CLJ 175 HC ***(refd)***

Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC ***(refd)***

Zulhasnimar Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors [2017] 8 CLJ 605 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7, 8
Government Proceedings Act 1956, s. 5

For the plaintiff - Ranjit Singh & Harveynder Singh Tyndall; M/s Ranjit Singh & Co
For the respondents/defendants - Siti Norashikin Hassanor; SFC

Reported by Najib Tamby

JUDGMENT

Abdul Wahab Mohamed J:

Introduction

[1] This is an action filed by the plaintiffs as the parents of Muhammad Yusuf Zahirrudin bin Amir Nizam ("the deceased") claiming that the death of the deceased was caused by the negligence of the defendants, their servants and/or agents and each and every one of them and/or by the breach of contractual duty, at all times to use reasonable skill and care, in diagnosis, management, care, treatment and advise provided by Hospital Changkat Melintang (HCM) and Hospital Seri Manjung (HSM) and/or by the servants or agents of the 16th defendant respectively.

Background Facts

[2] The first plaintiff is the lawful mother and the second plaintiff is the lawful father ("the parents") and dependents of Muhammad Yusuf Zahirrudin bin Amir Nizam, a five-year-old minor who died on 9 December 2018. The plaintiffs brought this action for their own benefit and the benefit of other dependents of the deceased under the Civil Law Act 1956 in particular ss. 7 and 8 thereof. The plaintiffs state that neither the plaintiffs nor anyone else have to date extract the letters of administration of Muhammad Yusuf Zahirrudin bin Amir Nizam ("the deceased").

[3] The first defendant was a medical officer in the employment of the 16th defendant, the Government of Malaysia, and attached to the second defendant, Hospital Changkat Melintang ("HCM").

[4] The third to 10th, 12th and 14th defendants were medical officers in the employment of the 16th defendant and attached to the 15th defendant, Hospital Seri Manjung ("HSM").

[5] The 11th defendant was a paediatrician and the 13th defendant was a Paediatric Consultant and Head of Paediatric Department in the employment of the 16th defendant and attached to HSM.

[6] On 6 December 2018 at about 3pm, Yusuf (the deceased), a minor aged five years and with known medical illness of:

(i) severe global development delay with failure to thrive;

(ii) congenital nystagmus;

(iii) possible perlizeus merzbacher disease; and

(iv) multiple hospital admissions for chest infections at PPUM.

[7] Whilst on holiday at Seri Manjung, Perak was taken to the Emergency Department of HCM with complaints of history of fever for two days, seven episodes of vomiting since 5 December 2018 and difficulty in breathing. The deceased is usually brought to Pusat Perubatan University Malaya (PPUM) for treatment as PPUM catered for the needs of the deceased.

[8] At HCM, the deceased was attended to by the first defendant and the diagnosis given was:

(i) Pneumonia;

(ii) Sepsis;

(iii) Acute gastro enteritis.

[9] The first defendant informed the parents that HCM does not have the oxygen ventilator machine for HFNC/CPAP/BPAP as provided for the deceased at PPUM and that HCM also did not have the paediatric specialist facilities to cater for the needs of the deceased who has a history of no active resuscitation (NAR) issued by PPUM. The first defendant then made a call to HSM and informed the parents to take the deceased to HSM. However, the first defendant did not inform the parents whether HSM has the facilities or paediatric specialist facilities to cater for the needs of the deceased as at PPUM.

[10] The first defendant then gave the plaintiffs the choice of whether to send the deceased to HSM or to Hospital Raja Permaisuri Bainun (HRPB) Ipoh. The first defendant did not clearly inform the plaintiffs of the facilities available at HSM or HRPB. The first defendant then informed the parents to make the choice between the two hospitals, failing which, the deceased is going to collapse. The parents were ready to take the deceased to PPUM but the first defendant advised against it as the oxygen level was falling, as such the plaintiffs had opted for HSM due to logistic reasons. The first defendant then issued a death-in-line (DIL) order and referred the deceased to HSM.

[11] The deceased arrived at HSM at 5.20pm and was registered at 5.37pm but was only admitted in the ward at 6.32pm on the same day, although the fourth defendant had specifically ordered for admission before the deceased left HCM.

[12] The admission clerking was done at 6.32pm by the third defendant, who clerked the deceased for conservative treatment/management plan and the diagnosis given was aspiration pneumonia although the parents informed the third defendant that the deceased is usually taken to PPUM for treatment.

[13] The deceased was seen by the fourth defendant 1 hour and 15 minutes after the deceased was admitted to the ward at 7.47pm. The plaintiffs claimed that the fourth defendant made no effort to clarify the conservative treatment/management plan clerked by the third defendant previously.

[14] The deceased's condition was more stable upon receiving the support of a high flow oxygen mask and had maintained the same from 6 December 2018 to 7 December 2018.

[15] However, the deceased's condition started to deteriorate on the 8 December 2018 upon which the plaintiffs had again requested for the deceased to be transferred to PPUM to which HSM had rejected on the ground that the deceased was in an unstable condition to be transferred to another hospital at the material time.

[16] The plaintiffs had nevertheless proceeded to hire a private ambulance and had the deceased transferred to PPUM. Unfortunately, the deceased wasn't able to survive his journey and had met his demise before arriving at PPUM.

The Plaintiffs' Submission

[17] It is the plaintiffs' case that the defendants jointly and severally owed a duty of care to the deceased in relation to his diagnosis, management, care, treatment and advise. The plaintiffs claimed that the death of the deceased was caused by the negligence of the defendants, their servants and/or their agents in breaching their contractual duty, at all times to use reasonable care and skill, in diagnosis, management, care, treatment and advise provided by HCM and HSM and/or by the servants or agents of the 16th defendant respectively.

[18] The plaintiffs claim that the defendants were negligent in the carrying out of their duties as follows:

(i) Failed to demonstrate the urgency to stabilise the deceased which resulted with aggravated injury and thereby causing the death of the deceased;

(ii) Plaintiffs and defendants had witnesses that the deceased was suffering from obstruction of his airway, but the 11th defendant (Dr Khairi) plan was to provide high flow oxygen mask although the 11th defendant admitted that the mask was not working;

(iii) The deceased was subjected to unnecessary delay in stabilising for inter-hospital transfer;

(iv) There was a failure in getting the paediatric specialist and the paediatric consultant to attend to the deceased in a timely manner thereby causing an unwarranted delay resulting in aggravated injury;

(v) The third defendant until the 15th defendant, delayed significantly the admission of the deceased with the knowledge that the deceased was a very sick child and should have been admitted promptly upon arrival at casualty unit;

(vi) Defendants failed to clarify from PPUM the suitability of the conservative treatment/management plan which began from HCM and was continued at HSM;

(vii) Defendants failed to appreciate that such advise or plan for conservative treatment/management plan carried a huge implication to the deceased welfare and care.

(viii) Defendants failed to stabilise or put the deceased on HFNC or CPAP or BiPAP or to properly ventilate or intubate the deceased and to prepare the deceased for inter-hospital transfer;

(ix) Defendants continued with the same conservative treatment/management plan despite the plaintiffs on 8 December 2018 showed anxiety to take the deceased to PPUM and again on 9 December 2018 had reported that the deceased was having rapid and laboured breathing and eagerly wished to transfer the deceased to PPUM;

(x) The 11th defendant demonstrated shocking words against the deceased who was a handicapped child (OKU) which resulted in aggravated injury to the feelings of the parents and thereby causing exemplary damage;

(xi) Defendants had falsely claimed that the deceased had absconded having refused to discharge the deceased or to prepare the deceased for inter-hospital transfer to PPUM which had been the intention of the parents throughout;

(xii) Defendants had failed to prepare a proper and effective future treatment plan for the deceased from the time the deceased arrived at HCM and HSM;

(xiii) Defendants failed to prepare a proper and effective system of paediatric health care at all times;

(xiv) Defendants failed to prepare a proper and effective ambulance service;

(xv) Defendants had uttered disrespect/disregard for the Pekeliling Ketua Pengarah Kesihatan Bil 2/2009 guidelines.

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The Defendants' Submission

[19] It was the defendants' submission that the second defendant had adhered to the standard of care of a reasonable medical officer in attending to the plaintiff and that records taken and treatment provided to the plaintiff by the second defendant was sufficient in view of the plaintiff's condition at the material time.

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[20] It was also the defendants' submission that the second defendant had in the instant case advised the plaintiffs to admit the deceased to the second defendant or to refer the deceased to HRPB Ipoh for further examination, but the said advise allegedly went unheeded by the plaintiffs.

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[21] The second defendant had further claimed that advise was given to the plaintiffs regarding the seriousness of the deceased condition and the risk that follows should the deceased not receive the necessary treatment.

[22] It was the first and second defendants' main submission that they did not cause the permanent injury suffered by the deceased in view of the delay by the plaintiffs to get the deceased treated in a timely manner as well as the delay on the part of the fourth to 12th defendants in attending to the deceased upon being admitted to HSM which had led to the deceased demise on 9 December 2018.

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[23] The defendants submitted that the treatment and diagnosis that has been given by HSM to the deceased were based on the condition of the deceased, the examination carried out on the deceased, the result of discussion with PPUM and medical facilities and expertise available at HSM at the material time.

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Court's Findings

Principles Of The Law

[24] The duty behoves upon the plaintiffs to satisfy this court on the balance of probabilities that the defendants had breached their duty of care in relation to the particulars of negligence set out in the pleadings.

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[25] The standard of care in medical negligence cases had been restated in the Federal Court case of *Zulhasnimar Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors* [2017] 8 CLJ 605; [2017] 5 MLJ 438 as follows:

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(a) In respect of the standard of care in medical negligence cases, a distinction should be made between diagnosis and treatment on the one hand, and the duty to advise of risks on the other.

(b) In regard to the standard of care for diagnosis or treatment, the test as expounded in *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 11, and as further 'glossed' and explained by the House of Lords in *Bolitho v. City and Hackney Health Authority* [1997] 3 WLR 1151 still applied. In *Bolam* the court held that:

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> ... in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent.
>
> The House of Lords in Bolitho added a 'gloss' over the *Bolam* test and stated that in applying that test the court had to be satisfied that the exponents of a body of professional opinion relied upon by the medical professional had demonstrated that such opinion had a logical basis and capable of withstanding logical analysis by the Court.

(c) In cases of duty to advice of risks, the position in Australia in *Rogers v. Whitaker* [1992] 175 CLR 479 would apply, namely it is now for the courts (rather than a body of respected medical practitioners) to decide whether a patient has been properly advised of the risks associated with a proposed treatment.

First And Second Defendants Breach Of Duty Of Care

[26] By reason of a doctor-patient relationship between the first defendant and the deceased, it is thus a non-issue that the first defendant owed the deceased a duty of care for a period of which the deceased was under his care.

[27] The deceased was brought to see the first defendant on 6 December 2018. The deceased was diagnosed with sepsis secondary to pneumonia and acute gastro enteritis.

[28] The first defendant had informed the plaintiffs that HCM did not have the oxygen ventilator machine for HFNC/CPAP/BiPAP as usually provided to the deceased at PPUM and that HCM also did not have the paediatric specialist facilities to cater for the needs of the deceased who had a history of a NAR (no active resuscitation) issued by PPUM.

[29] The first defendant had thus provided the plaintiffs with two options. First option was to seek conservative treatment at Hospital Seri Manjung (HSM) which involves the use of heavy flow oxygen mask as breathing aids and second option was to be treated with active resuscitation and ventilation machine such as BiPAP at Hospital Raja Permaisuri Bainun (HRPB) Ipoh. The plaintiffs had elected to admit the deceased at HSM.

[30] The plaintiffs claim against the first defendant revolves on the failure of the first defendant to advise the plaintiffs on inherent and material risks of the proposed treatment at HSM. As such, the applicable test in the instant case was the two-limbed *Bolam* test as explained in the case of *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 593 as follows:

A [11] Relying on that direction which is now accepted as the *Bolam* Test or *Bolam* Principle and the divergent medical evidence, the jury found that the hospital was not negligent. There are two limbs to the *Bolam* Test. The first is the requirement of a professional person in this case a doctor, to exercise reasonable care in undertaking the task associated with his particular professional calling. The second being commonly invoked, is the
B assertion that a defendant doctor will not be liable under the first limb if he has complied with a responsible professional practice, allowing for the possibility that there may be more than one such practice.

[31] The first defendant was at all material times informed of the deceased's history at PPUM and the successful treatment provided at PPUM
C using the CPAP/BiPAP machines. However, the option to transfer the deceased to PPUM was never on the table. The first defendant had instead suggested two other hospitals *ie*, HSM and HRPB Ipoh despite his awareness of HSM's lack of facilities.

[32] Nevertheless, the first defendant had, in exercising his duty as a
D medical officer, carried out sufficient examinations, made necessary calls to PPUM and HSM in respect of the deceased's case, and had stabilised the deceased's condition before arranging for the deceased's transfer to HSM.

[33] There was no failure on the first defendant to advise the plaintiffs of
E the seriousness of the deceased's condition. The urgency of the situation was in fact recorded in the medical report whereby the first defendant had informed the plaintiffs to make their choice between the two hospitals, failing which, the deceased is going to collapse.

[34] It was also in SP3's expert opinion that the deceased's clinical
F condition improved significantly after the management at HCM and that the medical management rendered to the deceased at HCM was appropriate and has met the minimum standard of care.

[35] Although the absence of CPAP/BiPAP machines at HSM was not informed to the plaintiffs, the treatment of high flow oxygen mask to be
G provided by HSM was brought to the attention of the plaintiffs. The plaintiffs lack of knowledge in respect of the availability of CPAP/BiPAP machines at HSM does not hold water in view of the fact that the plaintiffs themselves had witnessed the treatment of high flow oxygen mask provided to the deceased at HSM and had not made any complaints at the material time.

H **[36]** Having thoroughly scrutinised the evidence before this court, I find a total lack of evidence concerning the insufficiency of advice given as well as examinations carried out by the first defendant in exercising his duty as a medical officer.

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[37] It is thus in my considered view that the first defendant had not breached his duty of care in providing advice to the plaintiffs. The evidence, in this case, shows that the first defendant had taken into account the seriousness of the deceased's health condition, the urgency of the situation, the plaintiffs request for NAR and the logistical distance in rendering advice to the plaintiffs.

Third To 15th Defendants Breach Of Duty Of Care

[38] It was the plaintiff's main case that the failure on the part of the defendants to transfer the deceased to PPUM promptly which had caused the deceased's condition to deteriorate leading to his imminent death. As such, the same test above *ie*, the *Bolam* test applies in determining whether the third to 15th defendants had breached the standard of care in diagnosing, treatment and advice provided to the plaintiffs.

[39] The defendants in this case understood the deceased's health condition particularly the deceased's breathing difficulty and agreed on the necessity in taking measures to ensure the continuous supply of oxygen to the deceased. The defendants had in this case provided the deceased with a high flow oxygen mask treatment upon his arrival at HSM which had met with positive outcome at first instance.

[40] Despite the seriousness of the deceased's condition, the deceased was only attended by the 11th defendant, the paediatric specialist at 11am on 8 December 2018 *ie*, on the third day of admission.

[41] Based on the plaintiff's expert report, it is clear that most of the reviews and management plan of the deceased were made at the level of medical officers only. When asked for the future plan on treatment for the deceased, the 11th defendant stated that the plan he has for the deceased was to provide high flow oxygen mask although he admitted that the said treatment was not working.

[42] The findings of the internal inquiry shows that there was a lack of early focused discussion on the treatment options offered in HSM. It was also found that the non-invasive mode of ventilation was not readily available in the Department of Paediatrics at HSM. The unavailability of the CPAP/BiPAP machine in HSM resulted in sub-optimal patient care.

[43] Despite the lack of future plan on treatment for the deceased as well as the unavailability of the CPAP/BiPAP machine in HSM, the defendants had failed to transfer the deceased to PPUM for CPAP/BiPAP although the deceased was in a stable condition to be transferred on 6 December 2018 and 7 December 2018.

[44] Based on the factual matrix of the case, it is in my considered view that the defendants had breached their duty of care to ensure the best treatment provided to the deceased. The defendants had also failed to make the necessary attempt to transfer the deceased to a higher level of care institution that is appropriate to the medical needs of the deceased. It is in my considered opinion that the lack of urgency on the part of the defendants was very starking.

Vicarious Liability

[45] In considering the issue of vicarious liability, I am guided by the Federal Court case of *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529 where it was held as follows:

> "Whether private hospitals in Malaysia such as the Appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors *vis-à-vis* their patients while practising at such private hospitals as independent contractors?", the Federal Court at p. 565 stated:
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> The test for vicarious liability in *Various Claimants* requires the court to determine the nature of the relationship between the hospital and the medical practitioner, and the connection between that relationship and the wrongful act by the practitioner. The determination is a question of fact, based on a consideration of multiple factors and calls for an evaluative judgment. The terms regulating the general relationship between a hospital and a practitioner, and the particular terms applicable in the circumstances of the alleged negligence, may vary from case to case. As such, the vicarious liability of the private hospitals for the torts of medical practitioners cannot be determined with a broad brush in a factual vacuum.

[46] The Federal Court had in the same breath held on the doctrine of non-delegable duty as follows:

> Non-delegable duties are based on an assumption of responsibility, inferred from the circumstances of the relationship between the plaintiff and the defendant. It is not imposed based on relative resources or vested interest, nor does it depend on the terms of the relationship between the defendant and the person to whom the duty is delegated. The personal choice of a patient is not an independent test in itself but a relevant factor in applying the Woodland analysis, in particular in determining whether there is an antecedent patient-hospital relationship from which to impute as assumption of responsibility by the hospital towards the patient.
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> The facts in this case point against the existence of such an antecedent relationship. From the circumstances surrounding the Plaintiff's engagement of Dr Kok and admission to the Hospital, it can be inferred that the Plaintiff reasonably expected the operation to be conducted by Dr Kok with due care, wherever Dr Kok referred him to do so; the

> Hospital would merely provide the relevant facilities required for his admission and operation. In respect of the conduct of the operation by Dr Kok, we do not find that the Hospital has assumed a positive duty to protect the Plaintiff from injury.
>
> This scenario can be contrasted with a hypothetical situation where a patient enters a hospital and relies upon the latter's internal system to be referred to any suitable doctor on duty.
>
> In that situation, the hospital having accepted the patient and undertaken to treat him may well be under a non-delegable duty to ensure that he is treated with due care, by whomever the hospital engages to do so.

(See also the case of *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427).

[47] James Foong J (as he then was) in *Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor* [2006] 5 CLJ 175; [2006] 1 MLJ 57 laid out three requirements to be satisfied in order to establish vicarious liability as follows:

> [33] As regards to whether the second defendant is vicariously liable for the alleged wrongdoing of the first defendant, three requirements must be satisfied. First, there must be a wrongful, or tortuous action. Second, there must exists special relationship that is recognised by law between the person alleged to be vicariously liable and the tortfeasor. Third, the tort is committed within the course of employment – *Law of Torts in Malaysia* (2nd edn) by Norchaya Talib at p. 368.

[48] I find it germane at this juncture to also refer the case of *Pyu Pyu Ma v. Dr Lim Soo How & Ors* [2019] 1 LNS 829; [2019] 11 MLJ 628 where it was held that a healthcare provider may be held directly liable for not having a proper and effective system as well as for organisational failures.

[49] It was not disputed that the 11th defendant was an employee of the 15th defendant. The 15th defendant is therefore vicariously liable for the negligence of the 11th defendant.

[50] It is generally the position for the public hospitals that its doctors or nursing staffs are the direct employees of the public hospital, and it is trite law that the Government of Malaysia is liable for the negligence of its servants and agents. Section 5 of the Government Proceedings Act 1956 provides for the Government's vicarious liability in tort as follows:

> Liability of the Government in tort
>
> 5. Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without

A prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

[51] In view of my findings above in respect of the defendants' negligence
B conduct, it is thus in my considered view that the 15th and 16th defendants are vicariously liable for the negligence conduct of their employees.

[52] In this case, the 15th and 16th defendants also owed a non-delegable duty to the plaintiffs to ensure that the doctors/consultants have the necessary qualification, skill and competence to carry out their tasks in
C treating the deceased.

Contributory Negligence

[53] It was SP1's evidence at trial that the deceased has a history of breathing difficulty and had received treatment from PPUM. The first
D defendant had provided SP1 with two hospital options *ie*, HSM and HRPB Ipoh and SP1 had opted for HSM as admitted during trial.

[54] The plaintiffs were well aware of the risk they were taking when they had the deceased transferred to PPUM as may be gauged from SP1's testimonial evidence as follows:

E

Siti: Saya cadangkan juga sebelum perjalanan ke PPUM pegawai perubatan di Hospital Seri Manjung ada maklumkan kepada puan bahawa terdapat kemungkinan anak puan meninggal dunia semasa dalam perjalanan.

Suzilawati: Ya benar.

F

Siti: Saya katakan bahawa walaupun puan telah dimaklumkan berkaitan kemungkinan tersebut anak puan meninggal dunia puan masih tetap membawa anak ke PPUM?

Suzilawati: Ya benar.

G **[55]** The defendants had explained to the plaintiffs the deceased's condition and the need to stabilise the deceased before the transfer. The plaintiffs were informed that the deceased was not fit for transfer. However, the defendants' advice went unheeded.

[56] Having analysed evidence as adduced before this court, I find that the
H plaintiff's action in transferring the deceased to PPUM in an unstable condition was unreasonable. The plaintiff's rash action had ultimately caused the untimely death of the deceased.

[57] For the foregoing reasons above, I find that the plaintiffs had
I contributed largely to the death of the deceased. A finding of contributory negligence would result in the apportionment of liability to the plaintiff (see *Hamizan Abd Hamid v. Wong Kok Keong & Anor* [1994] 4 CLJ 122; and

Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor [1995] 3 CLJ 70; [1995] 2 MLJ 276). In the premises, I apportion liability at 40% to the third to 16th defendants and 60% to the plaintiffs.

Quantum Of Damages

[58] In assessing damages, this court is mindful that damages serve as a compensation and are not meant to unjustly enrich the claimant nor punish the wrongdoer. The damages must be fair, adequate and not excessive based on cogent evidence before the court (see *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292; *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324; *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885).

[59] It is also trite law that special damages must be pleaded and particularised and must be proved by either oral or documentary evidence (see *Jub'li Mohamed Taib Taral & Ors v. Sunway Lagoon Sdn Bhd* [2001] 4 CLJ 599; *ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd* [2001] 8 CLJ 1; [2001] 3 MLJ 64 and *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825).

[60] The plaintiffs claimed special damages for the total sum of RM26,064. Having scrutinised all evidence as adduced before this court, I find it reasonable to award the plaintiffs the total sum of RM26,064 as claimed.

General Damages

[61] The award for pain and suffering is often treated together with the loss of amenities. Learned counsel for the plaintiffs submitted that RM350,000 should be awarded for pain and suffering and loss of amenities. In reply, learned counsel for the defendants argued that RM100,000 should be awarded.

[62] Pain and suffering covers the physical pain of the injury and includes past and prospective pain including pain from medical treatment. It encompasses the medical treatment, the length of hospital stays, the number of operations, the loss or partial loss of use of the affected parts of the body after the incident, the element of depression and the reduction of the expectation of life. Loss of amenities includes loss of body faculties, deprivation of ordinary experiences, sexual impotence and loss of marriage prospects (objective elements); personal sense of loss (subjective element). It has been established that the fact that the plaintiff was unconscious of the pain and suffering does not eliminate the loss of the ordinary experience and amenities of life – the loss of amenities of his good and useful life. In such cases, damages for loss of amenities instead of pain and suffering can be awarded (*Lim Poh Choo v. Camden Health Authority* [1980] AC 174).

[63] The deceased was not promptly acted upon causing the condition of the deceased to deteriorate. Throughout the four days at HSM, the deceased underwent extreme pain, suffering, severe mental agony, distress and severe mental strain until his untimely death on 9 December 2018. This is an instance in which a substantial award for pain and suffering and loss of amenities is appropriate. In all the circumstances of the case, the court considers RM150,000 for pain and suffering and loss of amenities to be a fair and reasonable estimate of the amount to which the plaintiffs are entitled.

Aggravated Damages

[64] The plaintiffs had sought for additional compensation of aggravated damages for the total sum of RM500,000. The Federal Court had in the case of *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427; [2018] 3 MLJ 281 confirmed that aggravated damages in addition to general damages can be awarded in the case of medical negligence.

[65] Based on the evidence adduced before this court, it is in my considered view that the suppression of the deceased medical records had caused the plaintiffs to incur avoidable costs and expenses and time in filing the pre-action discovery.

[66] Furthermore, despite the overwhelming evidence of negligence on the part of the defendants, the defendants refused to admit liability but instead filed a defence denying liability. In my view, such conducts by the defendants would have caused unnecessary distress to the plaintiffs.

[67] Accordingly, in light of the conduct of the defendants in the present action, I find that it is reasonable and appropriate for this court to award the plaintiffs aggravated damages in the sum of RM100,000.

Interest

[68] Interest on the various head of damages is awarded as follows:

(i) Interest at 4% per annum on special damages from 6 December 2018 to the date of judgment (19 September 2022);

(ii) Interest at 8% per annum on pre-trial damages and general damages for pain and suffering and loss of amenities of life from date of service of writ (3 March 2020) to the date of judgment (19 September 2022); and

(iii) Interest at 5% per annum on the judgment sum from the date of judgment (19 September 2022) to date of full payment.

Conclusion

[69] In coming to a decision, this court has carefully weighed both the oral and documentary evidence adduced by all parties, scrutinised all the documents tendered and relied upon by the parties and considered the written submissions as well as the authorities filed by them. In considering the evidence as a whole especially the evidence of all the plaintiffs' witnesses *vis-à-vis* the pleadings, and that of the defendant, it is my considered view that the plaintiffs had proved their pleaded case, on the balance of probabilities, to the satisfaction of this court.

[70] For the foregoing reasons above, this court, therefore, ordered accordingly. All the awards to the plaintiffs are subject to a deduction of 60% for contributory negligence on the total award. Costs of RM150,000 to be paid by the third to 16th defendants to the plaintiffs.